IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 15 of 1982

For Approval and Signature:

HON'BLE MISS JUSTICE R.M. DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHIVSHANKER JETHALAL

Versus

KHAMBHALIA SARASWAT MASTAN TRUST

Appearance:

1. Second Appeal No. 15 of 1982

MR MEHUL S SHAH for

MR SURESH M SHAH for Appellant

NOTICE SERVED for Respondents No. 1,3

MR DD VYAS for Respondents No. 2,4-7

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT

Date of decision: 06/11/2003

ORAL JUDGEMENT

Heard the learned advocates.

This Second Appeal preferred under Section 100 CPC arises from the judgment and order dated 14th December, 1981 passed by the learned Assistant Judge, Jamnagar in Regular Civil Appeal No. 119 of 1980 arising from the judgment and decree dated 27th October, 1980 passed by the learned Civil Judge [JD], Khambalia in Regular Civil Suit No. 122 of 1974. The Appellant before this Court is the Appellant-Plaintiff before the Courts below.

The facts undisputed are :-

The respondents-defendants are the trustees of one Khambhalia Saraswat Mastan Trust, a Public Charitable Trust, duly registered as such. The said Trust owns the building known as "Old Brahmpuri" situated at Khambhalia. Under the Lease Deed Exh. 33 dated 14th November, 1965, part of the first floor of the said building was leased to the plaintiff for running a lodging and boarding House. The plaintiff agreed that two rooms on the First Floor on the southern side of the building were not leased to the plaintiff. The plaintiff also agreed that the occupants of the said two rooms shall have a right to passage through the Osri leased to the plaintiff. However, it appears that the Trust could not get a suitable tenant for the said two vacant rooms. Therefore, with a view to attracting the tenants, by Resolution dated 18th May, 1968 [Exh. 55], the Trust resolved to close the door between the said two rooms and the premises leased to the plaintiff by a brick-wall and to construct a separate staircase for passage of the occupants of the said two rooms. Accordingly, the door was removed and such wall was constructed so as to separate the premises leased to the plaintiff from the said two rooms. Since then, the said two rooms were leased to another tenant. However, on 25th October, 1974, the Trust passed Resolution [Exh. 56] to remove the wall constructed earlier and to place a door to facilitate the tenant in occupation. Accordingly, the wall constructed earlier was removed and the door was replaced as it was in existence at the time of lease Exh. 33. Feeling aggrieved, the plaintiff instituted above referred suit for a declaration that the defendant Trust had waived its right to passage through Osri leased to the plaintiff reserved under Clause 14 of the Lease Deed and for mandatory injunction directing the defendants to remove the door and to construct the wall between the premises leased to the plaintiff and the said two rooms. The suit was dismissed on 25th October, 1980. Feeling

aggrieved, the plaintiff preferred above referred Regular Civil Appeal No. 119 of 1980 which too has been dismissed on 14th December, 1981. Therefore, the present Appeal.

The learned advocate Mr. Shah has relied upon the Lease Deed Exh. 33, the Resolutions Exhs. 55 & 56, the evidence of one of the Trustees Exh. 54 and the reply to suit notice given by the Trust Exh. 32. Mr. Shah has submitted that the Trust had reserved its right to passage through Osri as evidenced by Clause-15 of the lease deed, the defendants were aware of their right to such passage. However, by passing Resolution Exh. 55, and by putting the said decision into action, the defendants have forfeited their right to passage through the said Osri by their own conduct. Thus, the defendants have waived their right to passage through the said Osri by a conscious decision. The said conduct of the defendants amounts to 'waiver' of the said right to passage. The plaintiff is, therefore, entitled to a decree for declaration and permanent injunction, as prayed for. Mr. Shah has also relied upon the observations made by the Hon'ble Supreme Court in the matter of Basheshar Nath v. Commissioner of Income Tax, Delhi & Rajasthan & Anr., [AIR 1959 SC 149]. While dealing with the contention of waiver, the Hon'ble Supreme Court has succinctly explained what the "waiver means". The Court has observed that, "..It has been said that "waiver" is a troublesome term in the law. The generally accepted connotation is that to constitute 'waiver', there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege." Mr. Shah has submitted that in the present case all the aforesaid constituents of the waiver do exist i.e. the defendants were aware of their right to passage through the said Osri. By deciding to separate the two premises by removing the door and constructing a wall, the defendants took conscious decision to relinquish their right to passage through the said Osri. The intention to relinquish the said right is evidenced by the language of the Resolution [Exh. 55] and the conduct of the defendants in constructing the wall and a separate stair case and by oral evidence given before the Court. Hence, in the submission of Mr. Shah, the plaintiff has successfully proved the case of waiver. Both the Courts below have erred in not passing the decree in favour of the plaintiff. He has further submitted that the lower Appellate Court having upheld the claim of the waiver putforth by the plaintiff, has

refused to pass the decree on the ground that such waiver was temporary. Mr. Shah has submitted that the lower Appellate Court having upheld the `waiver' ought to have passed decree in favour of the plaintiff.

I am unable to agree with Mr. Shah. It is true that the defendants did decide to remove door from the walls separating the premises leased to the plaintiff and the remaining two rooms and to construct a wall. But such an action was intended to attract tenant and not with a view to relinquishing the right to passage through the said Osri. In my view neither the language of the Resolution Exh. 55 nor the oral evidence Exh. 54 indicates that there was an intention to relinquish the right to passage through the said Osri. The conduct in question was undoubtedly intended to attract tenant and nothing else. I, therefore, hold that the plaintiff has failed to establish `waiver' claimed by him. Both the Courts below have rightly refused to pass decree in favour of the plaintiff.

In view of the above discussion, the Appeal is dismissed with costs.

{Miss R.M Doshit, J.}

Prakash*